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NO. 84-1821

In The

SUPREME COURT OF THE UNITED STATES

October Term of 1984

JOHN P. FORD, Warden,

Petitioner,

-v-

HORACE DWAYNE FORD,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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JURISDICTION

Respondent does not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

The Eleventh Circuit Court of Appeals in the instant case has correctly applied the rulings of this Court. The petitioner's claim that this case creates a per se rule in the circuit is without merit. The decision was limited to the facts and circumstances in this case. The petitioner has not suggested any special or important reasons for granting the writ.

This Court should deny the discretionary review requested.

STATEMENT OF THE CASE

A. Course of Proceedings

The petitioner neglected to summarize several aspects of the evidence and proceeding below in the petition. Thus, an addition to the statements is necessary.

After Horace Ford's plea of guilty on October 6, 1980, in the Superior Court of Dekalb County, Georgia, respondent filed a pro se pleading entitled "writ of motion for new trial withdrawal of plea." The trial court indicated, in its memorandum

appointing counsel on the motion, that the pleading would be designated as a motion for new trial and withdrawal of a plea. At the outset of the hearing, the state argued that the pleading should be treated as a habeas petition and the court elected to do so. The state habeas court made no separate findings of fact and conclusions of law in its order of April 6, 1981, denying relief.

Horace Ford filed a pro se petition for federal habeas corpus relief in the Northern District of Georgia, after the Georgia Supreme Court affirmed the judgment of the state habeas court. While his motion to proceed in forma pauperis was granted, his request for an evidentiary hearing and appointment of counsel was not ruled upon. The magistrate issued a report and recommendation denying relief on the merits and dismissing the action on May 8, 1983. Respondent timely filed objections on March 21, 1983, noting again the failure to rule on appointment of counsel or to hold an evidentiary hearing. The magistrate's report and recommendation was adopted without opinion by the district court on April 25, 1983 (Moye, J.).

Present counsel was appointed by the Eleventh Circuit.

B. Statement of Facts

Horace Dwayne Ford was indicted with Thomas Gary Ford and Pealie Mae Berry in the May Term of 1980, of the Superior Court of Dekalb County, Georgia, for the offenses of murder, armed robbery, aggravated assault, and conspiracy. Mr. Stanly Nylen was retained to represent Horace Ford and his brother, Thomas Ford.

On October 1, 1980, trial counsel filed a motion for discovery for each of the Ford brothers; he filed a motion for severance on October 3, 1980. The severance motion was based upon the statutory right to separate trials in cases in which the death penalty is sought. O.C.G.A. @17-8-4 (former Ga. Code Ann. @27-2101). No other discovery motions were filed. At the time of trial, counsel had not obtained several of the documents requested in discovery.

At the state habeas hearing, counsel testified that he was knew prior to the trial date that Thomas Gary Ford wanted to plead guilty, but that he had not previously communicated this to the district attorney. He stated that there had been no offer of a plea prior to the trial date. After recess and lunch on October 6, 1980, the district attorney finally solicited a plea, and at that time counsel communicated that Thomas Gary Ford wanted a plea but Horace did not. The district attorney stated an unconditional offer: either both defendants had to plead guilty or both go to trial.

Counsel was also quite aware that Horace Ford had unequivocally expressed his desire to go to trial for the seven months from indictment through the afternoon on the day of trial. Horace adamantly expressed this desire even after pretrial discussions about aggravating circumstances, after call of the case on October 6, 1980, after the message that his mother wanted the brothers to plead, after hearing about Pearlie's statement putting him and his brother at the scene, after counsel's explanation that Thomas Gary Ford could not testify on his behalf, and after he was first told that the court would not accept one plea without the other.

The habeas court did not allow trial counsel to give his opinion on whether the plea was voluntary. Mr. Nylen stated that he would not permit the two defendants to testify against each other. There was no testimony that Horace Ford was informed of what he was waiving in a plea, specifically the rights against compulsory self-incrimination, or to confrontation of witnesses, trial, or appeal. Nor is there anything in the record to suggest that Horace was ever informed of a potential conflict of interest in the joint representation, or of his right to conflict-free counsel.

REASONS FOR DENYING THE PETITION

A. Summary of the Argument

1. The Eleventh Circuit Court of Appeals correctly applied the actual conflict of interest test set forth in Cuyler v. Sullivan, 446 U.S. 335 (1980), in a joint representation case in which one attorney represented two co-defendants facing the death penalty, one client unequivocally wanted to proceed to trial while the other had wanted to plead, the plea bargain was expressly conditioned upon acceptance by both co-defendants on the trial date, and there was no waiver of conflict-free counsel. The client received no independent advice on whether to accept the plea bargain. The circuit court properly found that the plea was not knowing or voluntary and not the product of an informed choice.

2. The decision by the Eleventh Circuit Court of Appeals is consistent with this Court's decisions in Cuyler and Strickland and also with its own line of decisions. The circuit court undertook the threshold inquiry into attorney's performance, specifically whether there was active representation of divergent interests. The case does not create a per se bar against multiple representation. The holding is limited to the particular facts and circumstances of the case.

B. Argument

I. The Eleventh Circuit properly found active representation of conflicting interests after consideration of the facts.

(a) Independent review was appropriate.

The Eleventh Circuit applied the correct standard of review in rejecting the magistrate's factual findings and legal conclusions, based on the record without an evidentiary hearing. The magistrate erroneously concluded that the state court findings of fact were entitled to the presumption of correctness.

Questions of historical fact on the voluntariness of the plea are given deference under 28 U.S.C. @2254(d). Marshall v.

Lonberger, 459 U.S. 314, 103 S.Ct. 843, 849, 74 L.Ed. 2d 646, 656 (1983). However, the voluntariness of a plea on federal constitutional grounds is an issue meriting independent review, and the state court determination is not entitled to the presumption of correctness. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The question of effective waiver of the constitutional rights involved in this case, including the right to conflict-free counsel, is also governed by federal standards. Marshall, supra, 103 S.Ct. at 849, Boykin, supra, 89 S.Ct. at 1712. The issue of effectiveness of counsel with respect to pretrial preparation and conflict of interest is a mixed question of law and fact. The reviewing court is entitled to substitute its own factual findings for those of the district court. Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982), cert. denied, 103 S.Ct. 1798 (1983).

The circuit court was authorized to disregard the magistrate's erroneous fact-findings, and his incorrect legal requirement of actual prejudice.

(b) Only the facts necessary to the determination of active representation of actually conflicting interests were considered.

A fair reading of the Eleventh Circuit's opinion as a whole clearly shows that the circuit court did not premise its decision on a presumption of prejudice resulting from a solitary factual finding that Horace wanted to proceed to trial while the co-defendant did not, as petitioner suggests. Rather, the Eleventh Circuit cited the Cuyler standard, adhering to Strickland's language requiring an "adverse effect on performance." Ford v. Ford, 749 F.2d 681, 682 (11th Cir. 1985). The language directs the reviewing court the examine the attorney's conduct.

Strickland and Cuyler do not require an affirmative showing of actual prejudice; rather, it is a limited (not per se) prejudice which results from 1) active representation of conflicting interests, and 2) an actual conflict adversely

affecting performance. 104 S.Ct. 2067.

There is no real dispute about whether trial counsel actively represented both Horace and Thomas Ford up until the time pleas were entered. Obviously, he was attorney or record for both defendants. On the fifth and the third days before trial, he filed a motion on behalf of both brothers. He consulted with both of them on the day of trial. He was attorney of record for both when the pleas were entered. This case does not present a problem as to whether representation of a former client would impair counsel's ability to effectively cross-examine a prosecution witness. The "active representation" prong is satisfied.

The Eleventh Circuit does rely upon the record to find that the co-defendants interests were divergent in that Horace wanted a trial while Thomas wanted a plea. This articulated divergence, especially considered with the plea bargain, was the clearest indication of "actually conflicting interests."

The Eleventh Circuit did consider other factors evidencing the conflict of interest, Id., 749 at 681, but these were not necessary to the determination that "actually conflicting interests were being represented" up through the time of the plea bargain. For example, counsel's statement that he would not let either client testify, and that Thomas could not testify on behalf of Horace if Horace went on to trial, is indicative of a potentially serious conflict. The clients would have lost their right to compulsory process and confrontation, or the attorney would have been in the untenable position of cross-examining his own client. See Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1960), Stephens v. U.S., 595 F.2d 1066 (5th Cir. 1979).

Counsel's lack of preparation for trial was also presented as additional evidence of the conflict. Counsel was aware of Horace Ford's strong reluctance to enter a plea from the outset and his discomfiture with the plea before and after the sentencing. Since Horace had continuously indicated he wanted a trial, and no plea

bargain was not forthcoming until the afternoon of trial, the attorney's duty was to investigate the case more carefully than if he had entered the case before trial and a defendant only wanted to plead guilty. Scott v. Wainwright, 698 F.2d 427 (11th Cir. 1983). Horace Ford's attorney had not subpoenaed any witnesses to court in spite of the fact that the state was still pursuing the death penalty and Horace was likely to suffer serious consequences upon a conviction. No defensive motions were filed; the discovery motion filed five days before trial did not allow the attorney to obtain requested documents prior to the sentencing, nor review these prior to Horace's entering the plea.

By itself, the inadequate preparation for trial might not constitute ineffectiveness, but it is a circumstance showing counsel's expectation of pleading the case (which was unrealistic on the morning of trial, but in accordance with Thomas' interests), and counsel's possible motivation for accepting the combined bargain. Certainly Horace Ford's plea was not voluntary in the face of the attorney's lack of preparation which increased the likelihood of conviction.

(c) A vigorous advocate must give independent advice.

The ultimate inquiry in an ineffectiveness claim is on fundamental fairness. That is, "counsel's conduct [must have] so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 446 U.S. ___, 104 S.Ct. 2052, 2064, 80 L.Ed. 674 (1984). "The purpose is simply to ensure that criminal defendants receive a fair trial." Id. 104 S.Ct. 2052 at 2065.

In applying the appropriate standards to the facts herein, the Eleventh Circuit found a case of divided loyalties. Ford, 749 at 682. Horace Ford's counsel was immeasurably impaired with respect to basic requirements of effective counsel:

"Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 446 U.S. at 346, 90 S.Ct. at 1717. From counsel's function as assistant to

the defendant derive the overaarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adverarial testing process." [emphasis added] Strickland, supra at 2065.

Of course, the Strickland court indicates that there are kinds of state interference with counsel's assistance which results in a per se finding of prejudice, including interference with counsel's ability to make independent decisions about how to conduct a defense. Id., 103 S.Ct. 2052, at 2067. See also U.S. v. Cronic, 466 U.S. ____, 104 S.Ct. 2045, 2049, f. 31, 80 L.Ed.2d 674 (1984).

Petitioner's argument suggests that because the plea bargain was unconditional, in that both clients had to plead, counsel had no choice about whether to accept it; therefore, "he never had the opportunity to labor under a conflict of interest." (Petition, p. 9). Although the plea bargain was an unrelenting offer, the lawyer did indeed have several courses of action. He could have proceeded to trial for Horace and then solicited a plea bargain for Thomas. He could have gone to trial for both clients. He could have challenged the propriety of the plea bargain: a severance should have been effective on the day of trial in accordance with O.C.G.A. @17-8-4; due process required the cases to be considered separately.

Unfortunately, counsel was in a position of having clients who had clearly expressed different views on whether to proceed to trial. So, counsel went along with Thomas' interest in pleading. Counsel's interest in protecting one client from death by entering the plea took precedence over representing the other at a jury trial which he had insisted upon all along. If the plea bargain was not "interference with the attorney's ability to make independent decisions about how to proceed at trial," impairing counsel's effectiveness so that per se prejudice results it was certainly indicative of the actual conflict of interest which

counsel faced.

The Strickland court recognized that it is "difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." Id. 104 S.Ct. 2052 at 2067. Petitioner would require a specific indication of the adverse impact upon the "quality" of the lawyer's representation of the two brothers (Petition, p. 10). Petitioner finds fault with the circuit court's failure to mention a particular instance where the attorney acted "to the benefit or detriment of either client" (Petition, p. 9). Also, petitioner urges the result would have been the same, in that a separate attorney could not have successfully obtained a plea bargain for the brother Thomas, because of the unconditional plea offer (Petition, p. 10).

The focus of this argument is misguided. Counsel's duties lay not in successfully plea-bargaining for any one client, but in the "vigorous advocacy of [each] defendant's cause," 104 S.Ct. 2052 at 2065, and the avoidance of conflicts. In this case, it meant counsel should have acted to ensure Horace Ford received a fair trial. The fact that the right to jury trial is constitutionally guaranteed, while plea-bargaining for Thomas is not, might have given priority to Horace's interests. This is the heart of the "actual conflict."

The circuit court did not have to inquire further into counsel's conduct on the issue of whether Horace Ford had a fair trial, or a fair testing of the adversary process -- he simply did not get a trial even though he wanted one. When the adversary process breaks down, due to counsel's action or a failure to act, the result is unreliable; deficient performance has prejudiced the defense. Speculation about a different result is pointless. No further showing of actual prejudice is required. Id, 104 S.Ct. 2052 at 2064.

The petitioner's calculus of benefit/detriment in measuring deficient performance has been more appropriately applied in

review of trial transcripts and in general ineffectiveness claims. In those situation, the problem of failure to present a defense, cross-examine, or argue is apparent on the record. However, Horace had asserted his right to a jury trial all along; he was hardly benefited by waiving most constitutional rights with the guilty plea.

(d) The plea was not the product of an informed choice.

Petitioner goes so far as to argue that the attorney did not advise, persuade, or influence Horace Ford to accept the plea offer, but was merely a conduit of information (Petition, pp. 11-12). If that is the case, it simply supports the circuit court's finding that the plea was not the product of an informed choice, which include a rational weighing of the advantages of entering a guilty plea or going to trial. Counsel had a minimal duty to give advice within the range of competence demanded of attorneys in criminal cases. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The failure to give this minimal advice another instance of counsel's deficient performance.

If petitioner's version is correct, the attorney completely failed to consult with Horace Ford on a matter about which consultation is required. Careful scrutiny is to be given to pleas taken without the assistance of counsel and without a valid waiver of the right to counsel. Brady v. U.S., 397 U.S. 742 at 748, f.6, 90 S.Ct. 1463 at 1469, 25 L.Ed.2d 747 (1970). Certainly the same protection is accorded in joint representation. As the Brady Court noted:

> "This mode of conviction [guilty plea] is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precaution against unsound results, and we should continue to do so, whether conviction is by plea or by trial." 397 U.S. at 758, 90 S.Ct. at 1474.

Of course, the attorney did convey quite a bit of information on the day of trial, once the plea offer was tendered. He told Horace that Thomas could not testify for him. He reiterated that the case against Thomas was strong, and going to trial would

likely result in the death penalty. At this point, however, he was already in a conflict of interest.

The subtleties of the adverse effect on performance are perhaps the most difficult to determine from the limited record in a plea bargain situation. There may be conduct off the record which shows a conflict. And it may be what counsel fails to do that constitutes the prejudice. That is why Cuyler adhered to the reasoning that once actual conflict and active representation is shown, the pervasive effect of conflicting loyalties makes an affirmative showing of prejudice "an exercise in unguided speculation." Holloway v. Arkansas, 435 U.S 475, 491, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978).

As this Court has recognized:

> "Even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's represenation of a client. And to assess the impact of a conflict of interest on the attorney's option, tactics, and decisions in plea negotiations would be virtually impossible." Holloway, 435 U.S. at 490-1, 98 S.Ct. at 1181-2; see also Cuyler, 446 U.S. at 356-7, 100 S.Ct. at 1722-3.

Nonetheless, the Eleventh Circuit did carefully examine the facts in the record to determine the "active representation" of the one attorney throughout the proceedings, and the divergent ("actively conflicting") interests of Horace asserting his right to trial and his brother's desire to plead. The impact on counsel's performance is self-evident: counsel did not go to trial for Horace Ford.

II. No per se bar to multiple representation has been created.

Petitioner complains that the Eleventh Circuit failed to examine the attorney's conduct as to each defendant, and thus circumvented the requirement of examining performance. Because Stanley Nylen did not advise, encourage or persuade Horace Ford to accept the plea, petitioner contends, he did not act on behalf of Thomas' interests in avoiding the death penalty to the detriment of Horace; rather, petitioner argues, he was not in a position of actual conflict and there was no detrimental result attributable

to the attorney.

The Eleventh Circuit made explicit findings on the several factors that distinguish this case from others. The state definitely sought the death penalty during plea negotations, and had not waived it prior to the trial date. Ford, 749 at 683. The attorney did not have to persuade Thomas to plead guilty, since he "had already decided to plead." Id. 749 at 683. Horace had unequivocally wanted to go to trial. Id. 749 at 682. The attorney actively represented both clients up until the time pleas were entered. Obviously, he was attorney of record for both defendants, consulting with them through the day of trial, and appearing on their behalf at sentencing. Given the divergent interests of the two clients, counsel suffered a position of divided loyalties, which was not alleviated by the joint plea bargain. Id. 749 at 682-3. Counsel was aware of this divergence of interests before the trial date.

As previously noted, the Eleventh Circuit was authorized to disregard the magistrate's findings, which were not supported in the record, and his incorrect legal requirement of an affirmative showing of actual prejudice. Petitioner's argument that additional facts as to the attorney's conduct were required ignores the point that a conflict of interest can arise at any time. A conflict is not "assumed", as petitioner suggests, or only potential merely because the case does not go to trial. Plea bargains are perhaps the most obvious example of the manifest effect of a conflict at pretrial proceedings. Holloway v. Arkansas, 435 U.S. 475, 485, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978).

In recognition that the possibility of a conflict of interest in joint representation during pretrial consultations, hearings, and motions, and during trial, can render proceedings fundamentally unfair, the Georgia Supreme Court enunciated a mandatory rule in Fleming v. State, 246 Ga. 90, 270 S.E.2d 185

(June 9, 1980). Fleming requires co-defendants in which the death penalty was being sought to have separate and independent counsel. Petitioner argues that Ford creates a per se bar against multiple representation. To the contrary, the Georgia Supreme Court had already enunciated its Fleming prohibition against multiple representation in death penalty cases two weeks before Horace and Thomas Ford were jointly indicted on June 17, 1980. If the Georgia Supreme Court had followed its own Fleming rule, this case would already have been remanded to the trial court.

The Fifth Circuit had consistently held that not all cases of multiple representation result in a Sixth Amendment ineffectiveness violation before Cuyler's admonition was issued. See Foxworth v. Wainwright, 516 F.2d 1072, 1077 (5th Cir. 1975), cited in Cuyler, supra, at 100 S.Ct. 1718, f. 14. The Fifth and Eleventh Circuits have required the constitutional predicate issue of "active representation of actively conflicting interests"; even so, a factual inquiry in each case has determined if there is a constitutional violation. U.S. v. Freeman, 619 F.2d 1112, 1122 (5th Cir. 1980), cert. denied, 101 S.Ct. 1348 (1981); U.S. v. Alvarez, 580 F.2d 1251, 1255 (5th Cir. 1978); Baty v. Balkcom, 661 F.2d 391, 397 (1981); Westbrook v. Zant, 704 F.2d 1487, 1498 (11th Cir. 1983); Burger v. Zant, 718 F.2d 979, 989 (11th Cir. 1983).

Justice Marshall noted the ambiguity in the Cuyler decision as to the "adverse effect on performance" analysis. Cuyler, supra, 446 U.S. at 356-7, 100 S.Ct. at 1722-3. The Eleventh Circuit properly cited the standard in this case. Ford, 749 at 682.

On Horace Ford's guilty plea record, the court below examined what "the advocate [found] himself compelled to refrain from doing ..." Holloway, supra, 435 U.S. at 490-1, 98 S.Ct. at 1182, cited in Cuyler, 446 U.S. at 358, 100 S.Ct. at 1723. It was appropriate for the court below to examine a circuit case which involved representation of actively conflicting interests. In

Westbrook v. Zant, 704 F.2d 1487 (1983), the attorney's inaction in failing to file the viable jury challenge against the county, whom he had defended on a jury challenge, was due to the divergent interests of clients he represented. The adverse impact was the failure to fairly test the adversary process with the jury claim. Horace Ford's case is more extreme, and simpler: the clients were co-defendants, and the acceptance of the combined bargain meant there was no testing of the adversary process.

A client may still consent to joint representation in the Eleventh Circuit, but there must be an explicit waiver of the right to conflict-free counsel. Stephens v. U.S., 595 F.2d 1066 (5th Cir. 1979), U.S. v. Alvarez, 580 F.2d 1251, 1255 (5th Cir. 1978). This rule is in accordance with Justice Brennan's concurrence in Cuyler. Id. 100 S.Ct. at 1719; the protection is necessary for defendants whose attorneys fail to consider, or choose to ignore potential conflicts.

In Horace Ford's case, the record is silent on the issue of waiver of right to conflict-free counsel. The state has not sustained its burden to show the waiver was knowing and intelligent. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938), Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 270 (1962), Ford v. Wainwright, 526 F.2d 919 (5th Cir. 1976), Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976).

Of course, Federal Rules of Criminal Procedure 44(c), as well as the ABA Code of Professional Responsibility, DR 5-105, EC 5-15 (1976), direct counsel to avoid conflicts, inform the court of possible conflicts, and encourage the federal courts to inquire into potential conflicts.

The Ford case has created no new limitations on multiple representation in the circuit. It is consistent with rulings by this Court, the ethical rules, and circuit decisions.

CONCLUSION

Respondent strongly resists certiorari. The careful and factually limited decision by the Eleventh Circuit undertakes the correct analysis of the requirements of Cuyler and Strickland. Any further inquiry would be speculative. Because of the nature of relief accorded Horace Ford, briefing and argument would be appropriate if this Court decides to grant the writ of certiorari.

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CERTIFICATE OF SERVICE

I, Alice C. Stewart, appointed counsel of record for the respondent, hereby certify that in accordance with the Rules 46.5 and 28.3 of the Supreme Court, I have this date served one copy of the foregoing respondent's brief in opposition to the petition for writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit upon counsel of record for the petitioner by depositing one copy of the same in the U.S. mail with sufficient first class postage affixed thereto, addressed to:

Mr. William B. Hill, Jr., Esq.
Senior Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334.

This 21 day of June, 1985.

Alice C. Stewart
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Attorney for Respondent